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## Deviance, Resistance, and Love

Dorothy E. Roberts\*

Regina Austin's article, "*A Nation of Thieves*": *Securing Black People's Right to Shop and to Sell in White America*,<sup>1</sup> along with her other recent works on the Black community's deviants and outlaws,<sup>2</sup> points in a promising direction for progressive legal scholars. The scholarly treatment of deviance and the Black community could center on two inquiries. First, how does the dominant society define Black people as outlaws and use that status to justify its violence against us? Second, how does or should the Black community regard those who are defined as outlaws? Much of recent progressive legal scholarship has focused on the first inquiry. Even the work of critical race scholars tends to take the perspective of outsiders to critique the dominant mindset—"first seeing, then addressing, defects in the culture in which all of us, including the outsider, are immersed."<sup>3</sup>

My own work on motherhood, for example, concentrates on the way racism and patriarchy support each other to create an oppressive meaning of motherhood, including the dominant culture's devaluation of Black mothers.<sup>4</sup> Although I advocate a constitutional theory that will "affirm the role of will and creativity in Black women's construction of their own identities,"<sup>5</sup> I devote less attention to that construction than to the dominant one. Deconstruction

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\* Visiting Associate Professor, University of Pennsylvania Law School; Associate Professor, Rutgers University School of Law-Newark. B.A., 1977, Yale College; J.D., 1980, Harvard Law School. I would simply like to thank Regina Austin for her inspiration over the years.

1. Regina Austin, "*A Nation of Thieves*": *Securing Black People's Right to Shop and to Sell in White America*, 1994 UTAH L. REV. 149.

2. See Regina Austin, *Black Women, Sisterhood, and the Difference/Deviance Divide*, 26 NEW ENG. L. REV. 877 (1992) [hereinafter Austin, *Sisterhood*]; Regina Austin, *Sapphire Bound!*, 1989 WIS. L. REV. 539 [hereinafter Austin, *Sapphire Bound!*]; Regina Austin, "*The Black Community, Its Lawbreakers, and a Politics of Identification*," 65 S. CAL. L. REV. 1769 (1992) [hereinafter Austin, *Lawbreakers*].

3. Richard Delgado, *On Telling Stories in School: A Reply to Farber and Sherry*, 46 VAND. L. REV. 665, 665 (1993).

4. See Dorothy E. Roberts, *Punishing Drug Addicts Who Have Babies: Women of Color, Equality, and the Right of Privacy*, 104 HARV. L. REV. 1419 (1991) [hereinafter Roberts, *Punishing Drug Addicts*]; Dorothy E. Roberts, *Racism and Patriarchy in the Meaning of Motherhood*, 1 AM. U. J. GENDER & L. 1 (1993) [hereinafter Roberts, *Racism and Patriarchy*].

5. Roberts, *Punishing Drug Addicts*, *supra* note 4, at 1469.

is not pointless. These are two complementary tasks in a single mission: struggling for a more just society requires exposing and dismantling old illegitimate structures, as well as building new egalitarian ones.

Studying exclusively how the oppressed are defined by others is debilitating. It too often neglects how people resist those definitions and create their own concepts of justice, morality, and legality. It also ignores how imposed definitions and self-definitions help to shape each other. Austin's works, however, shift the focus of investigation from the actions and mindset of the powerful, to the actions and mindset of the outsider. She proposes, for example, that we identify with some Black lawbreakers, partly because their deviant behavior may be a form of resistance against oppression.<sup>6</sup> This viewpoint suggests a truly radical question—whether it is precisely in the lives of those considered most deviant that we will be able to discern a vision of liberation.<sup>7</sup>

### I. BLACK PEOPLE'S OUTLAW STATUS

The treatment of Black shoppers and sellers in white America reflects broader truths about the creation of outlaws. A white supremacist ideology defines all Black people as at least potential offenders. For example, Austin observes that "[B]lack people in general are treated like an outlaw people."<sup>8</sup> In other words, Black people are not only outlaws in the sense of breaking specific criminal statutes, but also in the sense of being viewed as people outside of the law. Individual Blacks are disproportionately in trouble with the law;<sup>9</sup> but our very blackness places us all beyond the bounds of

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6. See Austin, *Lawbreakers*, *supra* note 2, at 1780.

7. On the need for a positive vision of liberation, see, for example, Anthony E. Cook, *Beyond Critical Legal Studies: The Reconstructive Theology of Dr. Martin Luther King, Jr.*, 103 HARV. L. REV. 985, 993 (1990) ("Although theoretical deconstruction is important, the ultimate goal of critical theory should be the reconstruction of community from the debris of theoretical deconstruction . . ."); Robin West, *Jurisprudence and Gender*, 55 U. CHI. L. REV. 1, 72 (1988) ("Feminism must envision a post-patriarchal world, for without such a vision we have little direction.").

Critical race scholars' challenge to the critical legal studies critique of rights was a rejection of pure deconstruction. See, e.g., Harlon L. Dalton, *The Clouded Prism*, 22 HARV. C.R.-C.L. L. REV. 435, 440 (1987) (arguing critical legal studies critique of rights is "oblivious to, and potentially disruptive of, the interests of people of color"); Mari J. Matsuda, *Looking to the Bottom: Critical Legal Studies and Reparations*, 22 HARV. C.R.-C.L. L. REV. 323, 333-35 (1987) (demonstrating how people of color can adopt and transform constitutional text for radical objectives); Patricia J. Williams, *Alchemical Notes: Reconstructing Ideals from Deconstructed Rights*, 22 HARV. C.R.-C.L. L. REV. 401, 408-16 (1987) (arguing that significance of rights is different for Blacks and whites).

8. Austin, *supra* note 1, at 149.

9. Almost one in four Black men aged 20 to 29 is under the control of the

respectability. There is a profound interchange between the meaning of race and crime in America. This society views race as an important, if not determinative, factor in identifying criminals. Moreover, the law legitimates and enforces deeply-embedded images of Black criminality. Courts have scrutinized but allowed such practices as the routine consideration of a suspect's race in the decision to detain,<sup>10</sup> criminal profiles that include race,<sup>11</sup> and "street sweeps" that round up hundreds of individuals in Black neighborhoods without probable cause.<sup>12</sup> Storeowners' *modus operandi* for detecting shoplifters (including shoplifter profiles)<sup>13</sup> bears striking resemblance to police officers' use of race in apprehending muggers and drug dealers.

Beyond making Black people targets of suspicion when a crime has been committed, race also adds a criminal cast to all of our activities. As I previously suggested,

[n]ot only is race used in identifying criminals, it is also used in defining crime. In other words, race does more than predict a person's propensity for committing neutrally-defined offenses. Race is built into the normative foundation of the criminal law. Race becomes part of society's determination of which conduct to define as criminal.<sup>14</sup>

Austin notes on this point that Blacks "are condemned and negatively stereotyped for engaging in activities that white people undertake without a second thought."<sup>15</sup>

This double standard has deep roots. The slave codes formally wrote the racial construction of crime into law. In Virginia, for example, "[s]laves could receive the death penalty for at least sixty-eight offenses, whereas for whites the same conduct either was at most punishable by imprisonment or was not a crime at all."<sup>16</sup> The

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criminal justice system, compared to one in 16 white men. MARC MAUER, *YOUNG BLACK MEN AND THE CRIMINAL JUSTICE SYSTEM: A GROWING NATIONAL PROBLEM* 3 (1990).

10. See Sheri Lynn Johnson, *Race and the Decision to Detain a Suspect*, 93 YALE L.J. 214 *passim* (1983).

11. See Morgan Cloud, *Search and Seizure by the Numbers: The Drug Courier Profile and Judicial Review of Investigative Formulas*, 65 B.U. L. REV. 843, 844 (1985).

12. See Michael Z. Letwin, *Report from the Front Line: The Bennett Plan, Street-Level Drug Enforcement in New York City and the Legalization Debate*, 18 HOFSTRA L. REV. 795, 817 n.137 (1990).

13. See Austin, *supra* note 1, at 154.

14. Dorothy E. Roberts, *Crime, Race, and Reproduction*, 67 TUL. L. REV. 1945, 1954 (1993) (citation omitted).

15. Austin, *supra* note 1, at 149.

16. A. Leon Higginbotham, Jr. & Anne F. Jacobs, *The "Law Only as an Enemy": The Legitimization of Racial Powerlessness Through the Colonial and Antebellum*

criminality of slaves' conduct was determined by its threat to white supremacy.<sup>17</sup> Learning to read and write, a commendable enterprise for whites, was considered deviant behavior for slaves.<sup>18</sup>

Austin takes what is patently true about race and crime and extends it to the less obvious commercial realm. Some of the same forces that create Black criminals create those whom Austin calls "economic miscreants."<sup>19</sup> Partly because of the association of Blacks with crime, Black commerce becomes criminal: many white store owners treat Black shoppers as if all were potential shoplifters. The experience of Black shoppers derives from more than the general image of Black criminality; it is also based on a particular ideology about Blacks and their money. "It is assumed that blacks do not earn their money honestly, work for it diligently, or spend it wisely."<sup>20</sup> One advantage of Austin's shoplifter example is that, unlike drug profiles and street sweeps, it is an indignity that virtually every Black person in America has experienced. Thus, Austin allows us to see more clearly the pervasiveness of Blacks' outlaw status.

## II. SEEING RESISTANCE

Austin examines not only how whites view Black shoppers and sellers, but how Blacks view them.<sup>21</sup> Examining deviance from the standpoint of the oppressed uncovers the possibility that deviance sometimes constitutes an act of resistance. Henry Giroux saw a similar possibility in theories of public education.<sup>22</sup> Giroux rejected the radical position that schools function solely as agencies of social and cultural reproduction because that position ignored how students and teachers resist school oppression. Reproduction theorists overemphasized the idea of domination and downplayed the importance of human agency, thus "offer[ing] little hope for challenging and changing the repressive features of schooling."<sup>23</sup>

Giroux contrasted this focus on reproduction with a resistance

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*Criminal Laws of Virginia*, 70 N.C. L. REV. 969, 977 (1992) (citation omitted).

17. See *id.* at 1021-60 (discussing disparity of punishment of Blacks and whites depending on race of victim).

18. See *id.* at 1020; see also JANET D. CORNELIUS, "WHEN I CAN READ MY TITLE CLEAR": LITERACY, SLAVERY, AND RELIGION IN THE ANTEBELLUM SOUTH 37 (1991) (discussing literacy in pre-Civil War slave community).

19. Austin, *supra* note 1, at 149.

20. *Id.* at 153.

21. *Id.* at 150.

22. See HENRY A. GIROUX, THEORY AND RESISTANCE IN EDUCATION 7-41 (1983); Henry A. Giroux, *Theories of Reproduction and Resistance in the New Sociology of Education: A Critical Analysis*, 53 HARV. EDUC. REV. 257 (1983).

23. Giroux, *supra* note 22, at 259.



theory that restores the critical notion of human agency, while recognizing the constraints of structure.<sup>24</sup> Resistance theorists "demonstrate that the mechanisms of social and cultural reproduction are never complete and always meet with partially realized elements of opposition."<sup>25</sup> Reproduction theory had an external focus, confining its analysis to the way schools reproduced inequality at the service of external dominators. The new resistance theory explores the internal workings of schools to discover the way students accommodate, mediate, and resist these dominating social practices in their daily lives.<sup>26</sup> Students' oppositional behavior reflects the broader dialectical relationship between social structure and human agency: "Subordinate cultures, whether working-class or otherwise, partake of moments of self-production as well as reproduction; they are contradictory in nature and bear the marks of both resistance and reproduction."<sup>27</sup>

I want to set out several elements of the difficulty involved in pursuing this scholarly avenue. First, for it to succeed, we must be able to recognize resistance. It is easy to miss the subversive tactics of ordinary people. We usually look for resistance in more spectacular feats such as those carried out by freedom fighters, demonstrators, or rioters. But resistance to oppression usually takes the form of everyday oppositional actions rather than large-scale insurrections.<sup>28</sup> Austin identifies a number of typical responses of Black shoppers to discriminatory service by shopowners.<sup>29</sup> These range from informal, individualized acts of defiance, such as purposely making an obnoxious salesperson serve them, to formal collective rebellions, such as consumer boycotts.<sup>30</sup> All are possible acts of re-

24. *Id.* at 260.

25. *Id.* at 259.

26. *Id.* at 282.

27. *Id.* at 261.

28. See JAMES C. SCOTT, *DOMINATION AND THE ARTS OF RESISTANCE: HIDDEN TRANSCRIPTS* 203-23 (1990) (explaining how everyday, local resistance prepares dominated groups for more direct "political breakthroughs"); JAMES C. SCOTT, *WEAPONS OF THE WEAK: EVERYDAY FORMS OF PEASANT RESISTANCE* 28-29 (1985) (describing "the ordinary weapons of relatively powerless groups: foot dragging, dissimulation, false compliance, pilfering, feigned ignorance, slander, arson, sabotage, and so forth"); Elizabeth Fox-Genovese, *Strategies and Forms of Resistance: Focus on Slave Women in the United States*, in *IN RESISTANCE: STUDIES IN AFRICAN, CARIBBEAN, AND AFRO-AMERICAN HISTORY* 143, 160 (Gary Y. Okihiro ed., 1986) (describing slavewomen's resistance as "the recalcitrant and determined struggle of the individual soul or consciousness against reduction to the status of thing").

29. See Austin, *supra* note 1, at 156-57.

30. *Id.* Suzanne C. Carothers recounts a Black woman's description of what she learned from her grandmother about "dealing with white people" (meaning how to keep her self-respect amidst the assaults of racism):

sistance.

Moreover, most academics simply remain unaware of Black people's oppositional acts because of their distance—both physical and spiritual—from Black communities. Austin notes that white scholars especially may not be “privy to what blacks are doing in their own communities.”<sup>31</sup> As a result, “[b]oth black and white scholars have failed to recognize the vibrant cultural and institutional connections that exist among black people and support myriad forms of resistance, large and small.”<sup>32</sup>

Second, we must discern the transformative potential of what is largely a response to subjugation. Austin notes that some Black lawbreakers “are more deserving of sympathetic consideration than others.”<sup>33</sup> Some outlaws might be the most liberated among us because they have rebelled against the very norms and structures we are seeking to demolish. Others might operate out of an oppression mentality.<sup>34</sup> Not all deviance is resistance in the sense that it subverts the dominant mindset and structure.

Take, for example, Black unwed teenage mothers. In *Sapphire Bound!*, Austin posits “the possibility that young, single, sexually active, fertile, and nurturing black women are being viewed ominously because they have the temerity to attempt to break out of the rigid economic, social, and political categories that a racist, sexist, and class-stratified society would impose upon them.”<sup>35</sup>

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The way she did it was by taking us back and forth downtown with her. Here she is, a lady who cleans up peoples' kitchens. She comes into a store to spend her money. She could cause complete havoc if she felt she wasn't being treated properly. She'd say things like, “If you don't have it in the store, order it.” It was like she had \$500,000 to spend. We'd just be standing there and watching. But what she was trying to say [to us] was, they will ignore you if you let them. If you walk in there to spend your 15 cents, and you're not getting proper service, raise hell, carry on, call the manager but don't let them ignore you.

Suzanne C. Carothers, *Catching Sense: Learning from Our Mothers to Be Black and Female*, in *UNCERTAIN TERMS: NEGOTIATING GENDER IN AMERICAN CULTURE* 232, 239–40 (Faye Ginsburg & Anna L. Tsing eds., 1990) (alteration in original).

31. Regina Austin, *Left at the Post: One Take on Blacks and Postmodernism*, 26 L. & SOC'Y REV. 751, 752 (1992).

32. *Id.* at 751–52.

33. Austin, *supra* note 1, at 149 n.1; see also Austin, *Lawbreakers*, *supra* note 2, at 1780 (“A praxis based on a literal association of lawbreakers with race-war guerrillas could be justified only by a gross magnification of the damage black criminals actually inflict on white supremacy and a gross minimization of the injuries the criminals cause themselves and other blacks.”).

34. See DERRICK BELL, *AND WE ARE NOT SAVED: THE ELUSIVE QUEST FOR RACIAL JUSTICE* 215–21 (1987) (telling parable about slave scrolls that teach Blacks to throw off their oppression mentality).

35. See Austin, *Sapphire Bound!*, *supra* note 2, at 555.

Surely we should reject the dominant society's condemnation of Black teenage mothers as pathological. I believe that to imagine a liberated motherhood we must attend to these mothers' everyday struggles. But can we also view these women as resisting racist patriarchy by rejecting traditional notions of family? While they are defying the dominant norm, as Austin asserts, their decisions may be dictated more by economic and emotional despair than by political opposition. Besides, many become pregnant for very traditional, rather than subversive, reasons.

There are instances in the Black community's past where Black mothers' apparent emancipation was complicated by racial subordination. Elizabeth Fox-Genovese has criticized the view that unmarried, property-owning free Black women in the nineteenth century were relatively liberated, pointing out that their inability to marry was largely due to the subjugation of Black men.<sup>36</sup> Similarly, Black mothers' tradition of working outside the home, which has defied the norm of domesticity, is hardly a sign of emancipation considering its origins in the economic exploitation of Blacks.<sup>37</sup> In our eagerness to find a source of vision, we must resist the temptation to ascribe to outlaws political objectives they may not really have.<sup>38</sup>

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36. See ELIZABETH FOX-GENOVESE, *WITHIN THE PLANTATION HOUSEHOLD* 48–49 (1988) ("From the perspective of Afro-Americans as a people, should the independence of [slave] women be interpreted as a collective gain, or merely as the confirmation of slave men's weakness relative to white men?"). For another view, see Suzanne Lebsock, *Free Black Women and the Question of Matriarchy: Petersburg, Virginia, 1784-1820*, 8 FEMINIST STUD. 271, 287 (1982) (examining how single, free Black women in early nineteenth century Petersburg, Virginia, were able to acquire relative degree of economic autonomy).

37. See BELL HOOKS, *AIN'T I A WOMAN: BLACK WOMEN AND FEMINISM* 146 (1981) (criticizing white feminists' view of work as liberating force for women); see also ANGELA Y. DAVIS, *WOMEN, RACE & CLASS* 16–17 (1981) (observing domestic life was more liberating experience for slavewomen than was working for whites); M. Patricia Fernández Kelly, *Delicate Transactions: Gender, Home, and Employment Among Hispanic Women*, in *UNCERTAIN TERMS: NEGOTIATING GENDER IN AMERICAN CULTURE* 183, 194 (Faye Ginsburg & Anna L. Tsing eds., 1990) (noting that, in Southern California, Latina women's "search for paid employment is most often the consequence of severe economic need; it expresses vulnerability not strength within [their] homes and in the marketplace").

38. Elizabeth Fox-Genovese questions, for example, whether we know enough about slave women's acts of abortion and infanticide to view them as resistance against slavery—either as a way of protecting children from the brutalities of slavery, or terminating pregnancies that resulted from their slave masters' sexual abuse, or defying the command to reproduce for an oppressive system. See Fox-Genovese, *supra* note 28, at 158. "At the present state of research, we can, at best, say only that the sexual vulnerability and reproductive capacities of slave women influenced the ways in which they resisted. We can say little about the social significance that they attached to that womanhood." *Id.*



Third, some deviant acts that superficially appear to oppose the dominant structure actually support it. Some of Austin's examples of shoppers' resistance are more subversive than others. For example, there is a difference in the emancipatory potential of responses of Black shoppers who dress up, flash credit cards, buy unwanted and expensive goods, or engage the salesperson in cultured conversation,<sup>39</sup> and those who sabotage the salesperson's time or try to change the store's policies through a boycott.<sup>40</sup> The first group can be seen as defiantly disproving the stereotype (getting what we are not supposed to have to teach the world a lesson),<sup>41</sup> but they may also be seen as merely accommodating their behavior to appease the storeowner's fears. Similarly, viewing Black consumption as a form of resistance in which Blacks transform the image of mass-produced goods acknowledges our "human agency enlightened by a black critical consciousness."<sup>42</sup> But Austin concedes that here, as well, it is difficult to differentiate transformation from co-optation. In fact, Black consumption limited to shopping tends to sustain the status quo. Collective challenges to storeowners' policies may be more effective than solitary acts of indignation.<sup>43</sup>

The complexity of distinguishing between resistance and accommodation, between what merely reproduces the status quo and what subverts it, points out an extra danger in undertaking this scholarly pursuit. Writing about resistance risks supporting the powers that be by valorizing behaviors that in reality perpetuate oppression. It

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39. See Austin, *supra* note 1, at 156.

40. *Id.* at 156-57.

41. *Id.* at 165.

42. *Id.*

43. Cf. Joel F. Handler, *Postmodernism, Protest, and the New Social Movements*, 26 L. & SOC'Y REV. 697, 715 (1992) (contrasting 1960's accounts of collective political struggles with postmodern stories of individual and isolated acts of resistance).

Bell Hooks challenges contemporary Black women authors to create female protagonists who move beyond privatized self-creation to radical transformation. See BELL HOOKS, *BLACK LOOKS: RACE AND REPRESENTATION* 46-51 (1992). Hooks notes that, despite their rebellion against oppression and struggle to define themselves, most Black female characters settle in the end for traditional, rather than radical, gender roles. *Id.* at 47. For example, Celie, the protagonist of Alice Walker's *The Color Purple*, overcomes patriarchal violence only to become a capitalist entrepreneur and homeowner without the insight of radical politics or collective struggle. *Id.* And although the slave Harriet Jacobs defies the definition of herself as property, she ultimately accepts the conventional notions of womanhood. *Id.* at 47-48. Toni Morrison's *Sula* also transgresses all boundaries society imposes on her, yet, like Celie and Harriet, "[having] no conscious politics, never links her struggle to be self-defining with the collective plight of black women." *Id.* at 48. Hooks then calls on us to examine more critically Black women's quest for "identity." Rather than romanticizing the journey itself, we should test the political location of the journey's end. *Id.* at 47.

is much safer to deconstruct—to identify the racist, patriarchal, elitist, and homophobic features of dominant culture—and to seek, with conviction, to eradicate them. I am absolutely certain, for example, that the prosecution of poor Black women who use drugs during pregnancy imposes a racist standard for motherhood that further marginalizes these women from the health care system. I have lost little sleep wondering about whether I should take a stand against them. It has been a much more disturbing task to explore whether some criminal mothers' behavior can be viewed as resistance.<sup>44</sup>

One step is to examine how an outcast community views its own outlaws. Its criteria are likely to differ from those of the dominant society.<sup>45</sup> As Austin notes,

[w]hether "the black community" defends those who break the law or seeks to bring the full force of white justice down upon them depends on considerations not necessarily shared by the rest of the society. "The black community" evaluates behavior in terms of its impact on the overall progress of the race.<sup>46</sup>

Although the dominant society condemns Black lawbreakers, the Black community identifies with some of them as having acted in defiance. The community's embrace of outlaws is not a sufficient test of resistance, however. At the outset, there is rarely a "community response." The community's view of deviance is likely to be complicated and ambivalent. Nor is there a uniform view of consumerism within the Black community. Although some Blacks see its emancipatory potential, others view shopping as deviant because they consider pursuing status via consumption as wasteful.

Moreover, every Black person's view of the world is not necessarily subversive.<sup>47</sup> The Black community's evaluation of deviance

44. See Dorothy E. Roberts, *Motherhood and Crime*, 79 IOWA L. REV. (forthcoming 1994).

45. Cf. Robert M. Cover, *The Supreme Court, 1982 Term Foreword: Nomos and Narrative*, 97 HARV. L. REV. 4, 11 (1983) (presenting concept of jurisgenesis, which recognizes that communities develop diverse legal traditions, apart and in opposition to state law, based on their own normative visions). "If there existed two legal orders with identical legal precepts and identical, predictable patterns of public force, they would nonetheless differ essentially in meaning if, in one of the orders, the precepts were universally venerated while in the other they were regarded by many as fundamentally unjust." *Id.* at 7.

46. Austin, *Lawbreakers*, *supra* note 2, at 1772.

47. See HOOKS, *supra* note 43, at 58 ("Essentialist perspectives on black womanhood often perpetuate the false assumption that black females, simply by living in white supremacist/capitalist/patriarchy, are radicalized."); CORNEL WEST, *RACE MATTERS* 28 (1993) (advocating "prophetic framework" that eschews appeals to Black authenticity and encourages instead "moral assessment of the variety of perspectives

has been influenced by sexism, homophobia, and class elitism.<sup>48</sup> Misogyny helps to create the Black male outlaw persona;<sup>49</sup> the Black community has failed to identify with female lawbreakers as it has male lawbreakers because it expects women to conform to feminine roles.<sup>50</sup> Patriarchal notions of family shape some Black male sociologists' assessment of Black single motherhood. For instance, while William Julius Wilson rejected the racist theory that Black poverty is culturally transmitted, he endorsed the patriarchal solution of improving the economic status of Black males alone and rebuilding the traditional family.<sup>51</sup> Also, some Blacks' views of Black entrepreneurship are based on class elitism: the Black bourgeoisie considers selling to be a form of hustling associated with lower class work and not middle class professionalism.<sup>52</sup> The Black community's view of outlaws, then, requires deconstructing as well.

A further complication is the interaction between the dominant and outsider views of outlaws. Just as resistance is shaped by conditions of oppression, the dominant culture responds to resistance, either conceding to its pressure or finding ways to coopt its energy. To some extent, those in power have used the glorification of Black lawbreakers to their own ends. The stereotype of the aggressive, "macho" Black male legitimates the massive incarceration of young Black men.<sup>53</sup> Musical images of a bestial and exploitative Black manhood have become more popular with white audiences than with Black ones.<sup>54</sup> Martha Bayles surmises that Malcolm X would

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held by black people").

48. Cf. WEST, *supra* note 47, at 29 (contrasting Black cultural conservatism with Black cultural democracy that "rejects the pervasive patriarchy and homophobia in black American life").

49. Austin, *Lawbreakers*, *supra* note 2, at 1784-85; cf. HOOKS, *supra* note 43, at 81 (criticizing Eldridge Cleaver for "attempt[ing] to justify [his] perverse aggressive sexist behavior as a necessary response to racialized sexual victimization at the hands of white men").

50. Austin, *Lawbreakers*, *supra* note 2, at 1791-92.

51. See Austin, *Sapphire Bound!*, *supra* note 2, at 567-68 (discussing Wilson's views and criticizing his emphasis on "worsening economic position of black males as the prime reason for the increase in female-headed families"); Maxine Baca Zinn, *Family, Race, and Poverty in the Eighties*, 14 SIGNS 856, 871-74 (1989). The New Jersey Family Development Act, which penalizes single mothers on welfare and gives them financial incentives to marry, was sponsored by a Black man. See Dorothy Roberts, *Exploding the Myths Behind New Jersey Welfare Reform*, N.J. L.J., Jan. 25, 1993, at 21.

52. Austin, *supra* note 1, at 170.

53. HOOKS, *supra* note 43, at 109 ("The very images of phallogentric black masculinity that are glorified and celebrated in rap music, videos, and movies are the representations that are evoked when white supremacists seek to gain public acceptance and support for genocidal assault on black men, particularly youth."); Austin, *Lawbreakers*, *supra* note 2, at 1785.

54. See Martha Bayles, *Malcolm X and the Hip Hop Culture*, 2 RECONSTRUCT

abhor the "outlaw culture" of today's gangster rappers for selling out to white supremacy rather than resisting it: "He would . . . condemn its commercialization, whether by blacks or whites, and severely chastise any young man who poses as a bloodthirsty black sadist in order to satisfy the appetites of whites."<sup>55</sup>

Moreover, since all Blacks are defined as deviant to some extent, each one may perceive a stake in demonstrating that he or she is less deviant than the others, and therefore more deserving of white approval. Linda Ann Lewis, a Black woman accused of shoplifting who sued a television station for defamation, portrayed herself as a "sympathetic limited deviant"—a potential shoplifter, but not a prostitute.<sup>56</sup>

The Black community's suspicion of deviant shoppers and sellers is based partly on Black internalization of white opposition to Black economic development.<sup>57</sup> Austin, recognizing the complexity of the task, does not suggest a romantic embrace of all Black outlaws or of the Black community's response to its outlaws. Such an embrace would leave us simply reporting deviance, and not *engaging* on any level in political struggle. We need an ever-critical gaze on the community's view of its outlaws as well as the dominant definition. For example, legal scholars are more likely to recognize that the Black community's criticism of Black businesses may neglect the role law plays in creating barriers for Black entrepreneurship.<sup>58</sup> The community's perspective, in turn, tests our own willingness to accept the dominant precepts.

What, then, is our source of authority in identifying resistance? What tools can we use in distinguishing between deviance that resists oppression and deviance that reproduces it? How do we know which oppositional actions to support? What part of Black skepticism of shopping and selling results from elitism and hegemony, and what part is based on insight about oppression and distrust of

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TION, No. 2, 100, 101 (1993); see also Michel Marriott, *Hard-Core Rap Lyrics Stir Backlash*, N.Y. TIMES, Aug. 15, 1993, at A1 (describing Black protest against rap lyrics that demean women).

55. Bayles, *supra* note 54, at 101; see also WEST, *supra* note 47, at 31 (linking many gangster rap artists to George Bush and David Duke in their use of "market-driven racial reasoning"); cf. Handler, *supra* note 43, at 699 ("[W]hile the suppressed or alternative meaning (popular art) subverts or reorders the dominant priorities, it is also in complicity with the dominant form by taking advantage of it.").

56. See Austin, *supra* note 1, at 158 n.30 (discussing Lewis's case); see also Austin, *Sisterhood*, *supra* note 2, at 879–87 (noting how success of Black woman's defamation claim based on false accusation of prostitution depended on stereotyping Black women).

57. Austin, *supra* note 1, at 172 n.95.

58. *Id.* at 172.

capitalism? To some extent the white power structure has made Blacks suspicious of commerce and those suspicions may help to structure a more egalitarian form of commerce. Austin suggests, for example, that Black people might prefer cooperatives to purely capitalistic ventures.<sup>59</sup>

Austin offers a couple of qualifications for outlaws who merit our reconstructive attention—"lawbreakers who contribute either by way of instruction or example (like role models) or by way of material benefit to communal welfare."<sup>60</sup> In terms of Black commerce, she concludes that what most subverts the systemic sources of Blacks' material subordination is to link consumption with production by securing Black ownership of businesses in Black communities.<sup>61</sup>

### III. PRACTICING LOVE

There is yet another way of looking at Black deviants and lawbreakers. We can identify with some outlaws, whether or not they qualify as resisters. Regardless of the Black community's view of unwed mothers as cultural deviants or cultural rebels, we have a tradition of loving them. As Joyce Ladner noted, there are no "illegitimate" children in poor Black communities.<sup>62</sup> Many revolutionaries have professed the power of love as the motivation and method of liberatory struggle.<sup>63</sup> Paulo Freire declared, "I am more and

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59. See *id.*

60. *Id.* at 149 n.1; see also Austin, *Lawbreakers*, *supra* note 2, at 1787 ("[M]ost ordinary black male criminal behavior may not even be progressive . . . because it is not based on a thoroughgoing critique that attacks the systemic sources of their material deprivation.").

61. Austin, *supra* note 1, at 173-74; Austin, *Lawbreakers*, *supra* note 2, at 1807-11 (calling for support of Black informal entrepreneurship, including identifying with poorer Blacks who "hustle" to survive); see also Douglas Martin, *Strictly Business; Entrepreneurs Pave Path for the Next Generation*, N.Y. TIMES, Aug. 2, 1993, at B3 (discussing Black owned businesses as means of self-determination).

62. JOYCE A. LADNER, *TOMORROW'S TOMORROW: THE BLACK WOMAN* 213-14 (Anchor Books 1972) (1971); see also Austin, *Sapphire Bound!*, *supra* note 2, at 564-66 (stating young Black single mothers receive more support from other Black women than from rest of society); Austin, *Sisterhood*, *supra* note 2, at 879 ("In the name of a 'black sisterhood,' . . . we might respond to female deviance with understanding, support, or praise based on the distinctive social, material, and political interests of black women.").

63. See, e.g., MARTIN LUTHER KING, JR., *STRENGTH TO LOVE* 112-14 (1963) (describing "mass movement exercising love"); WEST, *supra* note 47, at 19 ("Self-love and love of others are both modes toward increasing self-valuation and encouraging political resistance in one's community."); *id.* at 95 ("Malcolm X was the prophet of black rage primarily because of his great love for black people."); Amilcar Cabral, *Connecting the Struggles: An Informal Talk with Black Americans*, in *RETURN TO THE SOURCE* 75, 77 (Africa Information Service ed., 1973) ("We are fighting for the freedom of our people—to free our people and to allow them to be able to love any kind



more convinced that true revolutionaries must perceive the revolution, because of its creative and liberating nature, as an act of love."<sup>64</sup> This view would mean affirming outlaws' humanity, regardless of their deviance, and fighting against the dehumanizing forces of society that create their material deprivation, as well as their outlaw status.<sup>65</sup> Above all, Austin's article condemns reflective academics, both white and Black (especially Black), who see their business as an immaterial, intellectual exercise. Her goal is not to figure out a theoretical distinction between deviance and resistance, but to work toward an economic game plan for poor Black communities.<sup>66</sup> Making any real contribution to this project requires going "Home," now and then.<sup>67</sup> Resistance scholarship embarks on a course that involves not only criticizing the dominant construction of outlaws, but also learning from outlaws about creating a just society. Perhaps the most important part of this task is simply to love those whom society has discarded.

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of human being."); Che Guevara, *Notes on Man and Socialism in Cuba*, in CHE GUEVARA SPEAKS 121, 136 (George Lavan ed., 1967) ("At the risk of seeming ridiculous, let me say that the true revolutionary is guided by a great feeling of love.").

64. PAULO FREIRE, *PEDAGOGY OF THE OPPRESSED* 70 n.4 (Myra B. Ramos trans., 1993) (1970).

65. Cf. Bell Hooks, *Feminism: A Transformational Politic*, in *THEORETICAL PERSPECTIVES ON SEXUAL DIFFERENCE* 185, 192 (Deborah L. Rhode ed., 1990) ("That aspect of feminist revolution that calls women to love womanness, that calls men to resist dehumanizing concepts of masculinity, is an essential part of our struggle.").

66. Austin, *supra* note 1, at 174-78.

67. Austin, *Lawbreakers*, *supra* note 2, at 1817; see also WEST, *supra* note 47, at 40 (criticizing current Black scholars for "tend[ing] to be mere academicians, narrowly confined to specialized disciplines with little sense of the broader life of the mind and hardly any engagement with battles in the streets").